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# STATE EXECUTIVE LAWMAKING IN CRISIS

JIM ROSSI†

## ABSTRACT

*Courts and scholars have largely overlooked the constitutional source and scope of a state executive's powers to avert and respond to crises. This Article addresses how actual and perceived legal barriers to executive authority under state constitutions can have major consequences beyond a state's borders during times of crisis. It proposes to empower state executives to address federal and regional goals without any previous authorization from the state legislature—a presumption of state executive lawmaking, subject to state legislative override, which would give a state or local executive expansive lawmaking authority within its system of government to address national and regional goals during times of crisis.*

*Although the approach of this Article is to suggest a solution for state courts, based on state constitutional interpretation, its analysis also recommends an approach for state legislatures as they consider state emergency management statutes, as well as for Congress as it considers national emergency management legislation.*

## INTRODUCTION

Courts and scholars have largely overlooked the constitutional source and scope of a state executive's power to avert and respond to crisis. The conventional public policy reaction to disasters and to regional or national problems focuses on expansion of federal jurisdiction or authority. Recent examples include the terrorist acts of

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September 11, 2001, and the natural disaster Hurricane Katrina brought to the coasts of Louisiana, Mississippi, Florida, and Alabama. The policy reaction to both of these disasters embraced significant national compensation and public works investments. These disasters engendered much discussion about the pace and size of the federal response, but little attention has focused on the state or local laws that play a role in defining, and often limiting, executive emergency authority. Where state and local laws are discussed, criticism is typically directed toward individual political leaders or a single state's poor reaction following a disaster or national or regional problem.<sup>1</sup> There is, however, scant discussion of the legal structure under which state and local officials make their decisions.

This Article addresses how actual and perceived legal barriers to executive emergency powers under state constitutions, such as separation of powers, can and do have major consequences beyond a state's borders. My inquiry stems from recent crises, but it is not limited to the reaction to September 11 or Hurricane Katrina. Instead, this Article's discussion of state constitutions is proactive and would be generally applicable to states.<sup>2</sup> The Article proposes a specific way of conceptualizing state executive power that transcends any single crisis or jurisdiction, and that will improve the resiliency of states to respond to interstate crises while also furthering the goal of political accountability. Its primary proposal is to empower state executives to address federal and regional goals without any previous authorization from the state legislature—a presumption of state executive lawmaking, subject to state legislative override—to give a state or local executive expansive authority within its system of

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1. For example, the House of Representatives report evaluating the Hurricane Katrina disaster emphasized “a failure of initiative,” pointing to human and operational factors at the state and local level, rather than to specific state and local legal reforms. *See generally* SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BI-PARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA (2006), available at <http://www.gpoaccess.gov/katrinareport/mainreport.pdf>.

2. Given that state and local executive power is guided by fifty different state constitutions, rather than one common U.S. Constitution, this presents a more difficult challenge than the debate surrounding executive power under the U.S. Constitution. Implicit in this analysis is the theme that state constitutions serve similar functions in a federal system, regardless of differences in their specific texts. *See* Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 288–302 (1998) (“My suspicion . . . is that the cluster of issues which emerge within states’ legal and political systems at this time in our history raise similar stakes and have more or less similar shapes.”).

government to address national and regional goals during times of crisis. This presumption would serve as an interpretational tool for state courts, executives, and legislatures, as well as for Congress, in addressing the issue of state emergency executive powers.

Part I examines the structure of decision making by state executives during times of interstate crisis, with a particular emphasis on the constitutional structure under which state executives manage crisis and the tensions presented in sharing crisis authority with national emergency management regulators. I present three examples to illustrate the problem with crisis management through state executive declaration of emergency: the September 11, 2001 terrorist attacks, California's electricity deregulation crisis, and Hurricane Katrina. As the responses to these events illustrate, successful interstate crisis management under the current system requires a governor to declare an emergency under state law and, in the course of doing so, may also require a state executive to assert more constitutional authority than state separation of powers otherwise affords. State executive emergency powers are not always on solid constitutional ground, as it may be perceived that state legislatures retain the ability to constrain the executive or it may be perceived that federal law preempts state regulatory action.

Part II argues that, in times of crisis, the constitutional basis for a strong state executive is more compelling than the case for a strong national executive.<sup>3</sup> At the outset, it is helpful to recognize that not every policy issue rises to the level of a crisis. A "crisis" is unexpected, requires immediate response, and has unambiguously unpleasant and serious consequences if left unaddressed.<sup>4</sup> This distinguishes policy issues, such as social security reform, from crises, such as the immediate aftermath of the September 11 terrorist

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3. Although I focus on state constitutions, for discussions of executive authority during times of crisis under the U.S. Constitution, see generally Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003). See also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005).

4. This definition draws from Roger D. Congleton, *The Political Economy of Crisis Management: Surprise, Urgency, and Mistakes in Political Decisionmaking*, 8 ADVANCES IN AUSTRIAN ECON. 183, 183 (2005).

attacks, the California electricity blackouts, or the devastation caused by Hurricane Katrina.<sup>5</sup>

I argue for broad executive authority under state constitutions during times of interstate crisis, including lawmaking and spending power, notwithstanding potential separation of powers limitations and implied federal preemption restrictions on the state executive. Regardless of a state's constitutional text, broad executive powers must extend to proactive crisis aversion as well as to crisis response. I argue that these powers are inherent executive powers. Although inherent, however, these powers are not exclusive, in that they are concurrent with the legislature's power to adopt law and to spend public money. Because the legislature is always able to override the executive's decisions on such matters, there is little to be gained from judicial review. Other than monitoring whether there is an egregious abuse of declaration of an emergency, as may occur where an executive declares a crisis for purely partisan political purposes, I argue that state courts should have little or no role in managing such emergency powers. The exercise of executive emergency powers is most effectively policed by the state legislature and not courts.

The proposed presumption of state lawmaking authority advances our understanding of the emergency powers of state executives. More importantly, the presumption holds promise for both state constitutional law and for law reforms involving crisis management. State courts themselves would ideally adopt such a presumption, making it a commonplace fixture of state constitutional interpretation by the judiciary. Of course, a scholarly inquiry into the issue is not likely to be endorsed wholesale by all fifty state courts, particularly given that the issue of executive power typically does not present itself to a state court until the opportunity to correct the problems it presents has passed. Even if state courts do not adopt this presumption wholesale, however, recognizing such a presumption as an aspect of state constitutionalism could have other benefits. For example, recognition of such a presumption can guide emergency legislative reforms at the state level, focusing state legislatures on the kinds of reforms that are most likely to make a difference in emergency planning and management rather than on micromanaging

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5. Throughout this Article, the term "crisis" is used to describe the triggering event, whereas the term "emergency" is used to describe a legal status for the assertion of executive powers. This distinction reflects the more prevalent use of the term *emergency* rather than *crisis* in most statutes and constitutions. See, e.g., *infra* text accompanying notes 19–33.

state executives in constitutionally futile and harmful ways. Such a presumption could also be endorsed by Congress in national emergency federal legislation, thus preempting any ambiguities regarding executive emergency powers that already exist under state law.

### I. THE STRUCTURE OF DECISIONMAKING BY STATE EXECUTIVES IN CRISIS

It is common to expect that federal regulators will serve a predominant role in emergency management,<sup>6</sup> but that is not how existing national emergency management laws are structured. Federal law gives state and local governments, not the national government, the primary responsibility to lead in crisis management.<sup>7</sup> For example, the structure of the Stafford Act,<sup>8</sup> which authorizes the president of the United States to declare emergencies, views federal resources as supplementing state resources.<sup>9</sup> State governors generally must request that the president declare an emergency, at which point a state submits to the cost-sharing criteria laid down in federal law.<sup>10</sup> The president can declare emergencies on his own, but only when he determines that primary responsibility for addressing the emergency lies with the United States, rather than the particular state facing the emergency situation.<sup>11</sup> The role of state executives in emergency management is thus fundamental to the operation of federal emergency management law.

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6. See Jo Becker & Lyndsey Layton, *Safety Warnings Often Ignored at Metro; Responses to Derailments, Track Flaws and Station Overruns Have Fallen Short, Records Show*, WASH. POST, June 6, 2005, at A1; Gilbert M. Gaul, *Lack of Funds Reduces Frequency of Health Inspections; Many U.S. Surgery Centers Are Overdue for Review*, WASH. POST, July 25, 2005, at A8; Jane Perlez & Kirk Johnson, *Behind Gold's Glitter: Torn Lands and Pointed Questions*, N.Y. TIMES, Oct. 24, 2005, at A1.

7. See Jonathan Walters & Donald Kettl, *The Katrina Breakdown*, GOVERNING MAG., Dec. 2005, at 20, 22 (noting that crisis management remains primarily a state and local, not a national, problem).

8. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (codified as amended at 42 U.S.C. §§ 5121-5206 (2000)).

9. The Stafford Act's requirements are described at length in ELIZABETH B. BAZAN, CONG. RESEARCH SERV., ROBERT T. STAFFORD DISASTER RELIEF AND EMERGENCY ASSISTANCE ACT: LEGAL REQUIREMENTS FOR FEDERAL AND STATE ROLES IN DECLARATION OF AN EMERGENCY OR MAJOR DISASTER (2005), available at <http://fpc.state.gov/documents/organization/53688.pdf>.

10. 42 U.S.C. § 5191(a). Provisions detailing cost-sharing requirements may be found at 42 U.S.C. § 5193.

11. 42 U.S.C. § 5191(b).

Federal law does not speak to the actions of state institutions in managing disasters or requesting federal aid, leaving these largely to state constitutions and state statutes. Although state executives possess substantial power under state constitutions to declare an emergency, the scope of executive power after an emergency has been declared is frequently unclear. Declaring an emergency under a state constitution may allow a state executive to address a crisis by granting the executive sweeping emergency lawmaking powers, including appropriation authority. Indeed, the texts of many state constitutions allow state executives to exercise fairly broad emergency powers.<sup>12</sup> However, the use of state emergency powers has experienced mixed success, due to shared authority problems between state executives and state legislatures, as well as authority problems between state and federal officials. At their worst, these shared authority problems create a credit/blame game, in which there is fierce competition between institutions to take credit and avoid blame.<sup>13</sup> In situations where the political goals of the executive are not identical to the legislature or to national officials, there is a strong potential for inaction in the face of crisis and, at the extreme, blame.

#### A. *State Constitutions and the Declaration of Emergency*

Given predominant notions of legislative supremacy under state constitutions, state legislatures frequently limit state executives, including during times of crisis. State separation of powers principles sharply limit the power of the executive branch to exercise authority not specifically assigned to it, either under a state's constitution itself or pursuant to legislative delegations. For example, many state constitutions limit the power of the executive branch to engage in rulemaking absent a specific delegation of power from a state legislature.<sup>14</sup> Adding even more uncertainty, most state constitutions fragment the executive into multiple elected officials, as opposed to the single elected official at the national level in the office of the U.S.

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12. See *infra* notes 18–33 and accompanying text (addressing the Louisiana and Alabama constitutions).

13. For a discussion of how shared authority affects the powers of mayors, see Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 116 YALE L.J. (forthcoming 2006) (manuscript at 114–29), available at [http://law.bepress.com/uvalwps/uva\\_publiclaw/art47](http://law.bepress.com/uvalwps/uva_publiclaw/art47).

14. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1187–1216 (1999) (discussing limits on state agency rulemaking under various state constitutions).



president.<sup>15</sup> Multiple elected executive officials may make it unclear what powers the chief executive—the governor—has when the other state-wide executives are unavailable or unable to act.<sup>16</sup>

However, state constitutions may extend far broader emergency powers to a state agency, even where a state legislature has not spoken to the issue. In addressing an emergency, such as the blackouts that plagued California's deregulated power markets in 2000 and 2001, an executive may possess powers independent of the specific statutory program under which it exercises regulatory power.<sup>17</sup> The state and local response to Hurricane Katrina is a classic emergency situation, in which state officials were able to assert broader lawmaking powers to respond to the crisis, notwithstanding the separation of powers restrictions in Louisiana's constitution.<sup>18</sup> Many state constitutions explicitly provide for the declaration of emergencies in their texts. However, state constitutions rarely speak clearly as to what triggers an emergency, to the scope of the executive branch's power to make controlling law (including the power to engage in agency rulemaking), or to the exercise of other executive powers during a crisis that falls short of official declaration of an emergency. As I suggest below, many state legislatures purport to elaborate on these powers by statute, although the constitutional power of a state legislature to define the emergency powers of the executive is unclear.

Louisiana's constitution gives strong powers to the executive—the Louisiana governor, the state's "chief executive officer"<sup>19</sup>—during

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15. See William P. Marshall, *Break Up the Presidency?: Governors, Independent Attorneys General, and the Lessons from the Divided Executive*, 116 YALE L.J. (forthcoming 2006) (manuscript at 1–2), available at <http://ssrn.com/abstract=882895> (discussing the "divided executive," in which executive power is apportioned among different executive officers not subject to gubernatorial control" (quoting Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 722 (1997))).

16. Even states that have multiple elected executive officials recognize unique and more comprehensive powers for a governor, often in express constitutional provisions. For example, the governor is frequently designated the chief or supreme executive, has special obligations to execute laws, proposes a budget, and has veto authority, sometimes including a line item veto. See *id.* (manuscript at 14–15).

17. For a discussion of California's emergency response, see *infra* notes 45–58 and accompanying text.

18. On separation of powers under Louisiana's constitution, see Jay S. Bybee, *Agency Expertise, ALJ Independence and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 434–37, 437 n.27 (1999).

19. LA. CONST. art. IV, § 5.

times of crisis. It establishes an Interim Emergency Board to appropriate state funds when it is determined that an “emergency or impending flood emergency exists.”<sup>20</sup> Louisiana’s governor is given the power to call state armed forces “to preserve law and order, to suppress insurrection, to repel invasion, or in other times of emergency.”<sup>21</sup> The governor may also convene a special legislative session “in the event of public emergency caused by epidemic, enemy attack, or public catastrophe.”<sup>22</sup> The Louisiana constitution further provides for the continuity of government, allowing the legislature to specify how the state government will operate when incumbent officials are unavailable to perform their duties.<sup>23</sup>

By statute, the Louisiana legislature has delegated several supplemental powers to Louisiana’s governor during a crisis. Statutes hold the governor responsible for “meeting the dangers to the state and people presented by emergencies or disasters” and, in order to do so, authorizes the governor to “issue executive orders, proclamations, and regulations,” which shall have the “force and effect of law.”<sup>24</sup> A disaster or emergency is to be officially declared by executive order and continues for thirty days, unless terminated or renewed by the governor.<sup>25</sup> During a time of emergency, the legislature has granted the governor enormous powers, including the power to “[u]tilize all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster or emergency.”<sup>26</sup> As a check on the use of emergency powers by the executive, “by petition signed by a majority of the surviving members of either house” the legislature retains the power to “terminate a state of disaster or emergency at any time.”<sup>27</sup>

Alabama takes a slightly different approach than Louisiana. Alabama’s constitution vests in the governor the “supreme executive power.”<sup>28</sup> The governor of Alabama has the power to call for a special session of the legislature in extraordinary circumstances,<sup>29</sup> but the

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20. *Id.* art. VII, § 7.

21. *Id.* art. IV, § 5.

22. *Id.* art. III, § 2.

23. *Id.* art. XII, § 11.

24. LA. REV. STAT. ANN. § 29:724 (2006).

25. *Id.*

26. *Id.*

27. *Id.*

28. ALA. CONST. art. V, § 113.

29. *Id.* art. V, § 122.

constitution does not speak more generally about the governor's emergency powers. The emergency management provisions of Alabama's code allow the governor to declare a state of emergency in cases of attack or natural disaster of significant proportions, but do not speak expressly to emergencies in other situations.<sup>30</sup> Immediately upon declaring an emergency, the governor must call the state legislature into special session, and the emergency can be terminated by the governor or by joint resolution of the legislature.<sup>31</sup> During a time of emergency, the governor has the authority "[t]o enforce all laws, rules and regulations relating to emergency management and to assume direct operational control of all emergency management forces and helpers in the state."<sup>32</sup> The Alabama code speaks to the specific authority the governor possesses during a crisis, such as the power to formulate and execute plans for the control of traffic.<sup>33</sup> A catch-all provision appears to allow the governor "[t]o perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population,"<sup>34</sup> but in Alabama, the governor is not given general emergency lawmaking or appropriation authority.

Under Louisiana's approach, the state constitution and legislative framework give the executive broad emergency powers. However, not every state extends such broad powers to state executives. Alabama's approach illustrates how there is quite a bit of variation from state to state in the ex ante management of state executive emergency powers. Not every state executive is delegated the same degree of power by the state legislature. As a constitutional matter, given the dearth of case law in individual jurisdictions, it is frequently unclear whether these emergency powers are inherent executive powers or emergency powers delegated by the state legislature.<sup>35</sup> How these emergency powers are classified is important in at least two respects. First, to the extent that emergency lawmaking is not recognized ex ante as an inherent executive power, at a

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30. ALA. CODE § 31-9-8 (2005).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), it was recognized that, under federal separation of powers principles, the executive's power to issue an emergency order stems either from an act of Congress or from executive authority under the Constitution, *id.* at 585.

minimum it is unclear whether state constitutions grant broader powers to governors and other executives to act during a crisis, independent of legislative delegation. This uncertainty may encourage inaction by state executives where *ex ante* authority is not clear. For example, if Louisiana did not have a statute elaborating on the governor's emergency powers, it would be unclear whether the governor would still possess emergency powers under the state constitution. In a state like Alabama, where the state legislature has designated attacks and natural disasters as statutory grounds for declaring emergencies, it is unclear whether the governor possesses broader authority to declare an emergency in response to an energy or man-made environmental disaster. Second, although courts may possess the power to review executive compliance with a statute, to the extent that emergency powers are not fully specified, it is not clear that courts have any power to limit state executive authority during times of interstate emergency or crisis. After illustrating why the answers to these questions might matter to state and local crisis management, I address them by arguing that the best interpretation of state constitutions is to treat executive emergency lawmaking as an inherent rather than delegated power, and that as a general matter, this power should not be reviewable by state courts.

*B. Actual and Perceived Limits on State Executive Emergency Powers*

Even if limits on state executive power are not judicially enforced, the existence of any perceived limits on state executive powers during times of crisis is problematic for both pragmatic and democratic reasons. Pragmatically, during ordinary times state legislatures meet infrequently and often for only a few months each year. Without a strong executive, a state may not see itself as capable of addressing an interstate crisis at all.<sup>36</sup> Some states have attempted to address this problem in the emergency context by requiring a governor who has declared an emergency to immediately call the state legislature into session (which could allow the legislature to authorize executive action *ex post*).<sup>37</sup> Other states do not require the governor to call the legislature into session until the time of an

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36. Various approaches to executive power in different state constitutions are discussed in Rossi, *supra* note 14.

37. *See, e.g.*, ALA. CODE § 31-9-8 (2005); ARIZ. REV. STAT. ANN. § 26-303 (2005); GA. CODE ANN. § 38-3-51 (2006); IDAHO CODE § 67-5506 (2006); MINN. STAT. § 12.31 (2005).

emergency expires—too late to authorize a governor or other official to take action during the emergency.<sup>38</sup>

The democratic problems presented by perceived limits on executive power are more serious—and more complex. Where it is not preempted by federal law, the power of state officials to declare and manage an emergency has been recognized to be an area entirely within the core sovereignty of state government.<sup>39</sup> If state officials perceive any limitations on state executive authority, this creates an opportunity for state officials to evade responsibility for a failure to act. Regardless of whether actual limits may exist or be enforced, therefore, the existence of perceived limits under state constitutions may leave states both powerless to address a crisis and without any constitutional responsibility for taking action. Perceived limits may arise under state separation of powers, where a legislature has attempted to limit executive authority under emergency framework statutes. Alternatively, the prospect of federal preemption hobbles state officials from confidently asserting state authority against the backdrop of ambiguous federal law.

Three recent examples of emergency responses illustrate the democratic challenge posed by perceived limits on state executive constitutional power, particularly when state executives share regulatory turf with state legislatures and federal authorities. Declaration of an emergency by a state executive is frequently the beginning of negotiation between state and federal regulators. Although such negotiation between state and federal officials may go smoothly—as occurred between New York and the White House in the high-anxiety weeks following September 11—it can break down where state executives are not able to assert themselves as possessing comprehensive authority to act on behalf of the state. These problems are particularly apparent outside of terrorist attacks (for which a strong national response is expected), and can be exacerbated where a state's governor comes from a different political party than the U.S. president—California's electricity crisis and Hurricane Katrina are leading examples. This breakdown in communication highlights the

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38. See, e.g., ALASKA STAT. § 26.20.040 (2006); CAL. GOV'T CODE § 8624 (West 2006); KAN. STAT. ANN. § 48-924 (2005); MONT. CODE ANN. § 10-3-302 (2005); N.C. GEN. STAT. § 14-288.15 (2005); S.C. CODE ANN. § 1-3-420 (2005); UTAH CODE ANN. § 63-5a-5 (2005); WIS. STAT. § 166.03 (2006).

39. See *Duke Energy Trading & Mktg. v. Davis*, 267 F.3d 1042, 1053–54 (9th Cir. 2001) (noting that, during California's electricity crisis, California's Governor possessed broad emergency powers, to the extent they were not preempted by federal law).

need for a clear constitutional understanding of executive emergency authority at the state level.

Following the attack on the World Trade Center on September 11, 2001, chaos erupted in New York City. Despite the precarious climate, the emergency response decisions of local, state and federal officials were unambiguous, swift, and relatively smooth. Governor Pataki made an immediate declaration of an emergency,<sup>40</sup> which was followed by President Bush's quick release of federal disaster resources for the area.<sup>41</sup> It is clear that FEMA broadly construed the Stafford Act to afford New York City federal funding for rebuilding, even where the legal limits on funding had been exceeded, and even released unspent federal money to state and local officials.<sup>42</sup> The reaction to this disaster was unified and swift, perhaps reflecting both President Bush's characterization of the target of the attack as America,<sup>43</sup> as well as the strong sense of trust that may have existed among political allies across local, state, and national levels of government.<sup>44</sup>

California's blackouts provide a very different illustration of federal-state coordination in response to a state declaration of emergency. In June 2000, warm weather posed a challenge to a relatively new electric deregulation plan adopted by the state legislature. Several hundred thousand California customers were left

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40. See Press Release, Governor George E. Pataki (Sept. 11, 2001), [http://www.ny.gov/governor/press/01/sept11\\_1\\_01.htm](http://www.ny.gov/governor/press/01/sept11_1_01.htm) (last visited Sept. 28, 2006).

41. See Press Release, FEMA (Sept. 11, 2001), <http://www.fema.gov/news/newsrelease.fema?id=5692> (last visited Sept. 28, 2006).

42. The Stafford Act limits the federal share of any rebuilding obligations to 75 percent. For a discussion of the Stafford Act, see generally U.S. GEN. ACCOUNTING OFFICE, DISASTER ASSISTANCE: INFORMATION ON FEMA'S POST 9/11 ASSISTANCE TO THE NEW YORK CITY AREA (2003), available at <http://www.gao.gov/new.items/d03926.pdf>.

43. In his comments to the nation on the evening of September 11, President Bush stated "America was targeted for attack." Press Release, George W. Bush, Statement by the President in His Address to the Nation (Sept. 11, 2001), [http://www.yale.edu/lawweb/avalon/sept\\_11/pres\\_state001.htm](http://www.yale.edu/lawweb/avalon/sept_11/pres_state001.htm) (last visited Sept. 28, 2006). Earlier that day, in making remarks at a Florida school, he had referred to an "apparent terrorist attack on our country." Press Release, George W. Bush, Remarks by the President After Two Planes Crash Into World Trade Center (Sept. 11, 2006), [http://www.yale.edu/lawweb/avalon/sept\\_11/president\\_008.htm](http://www.yale.edu/lawweb/avalon/sept_11/president_008.htm) (last visited Sept. 28, 2006).

44. Mayor Giuliani, Governor Pataki, and President Bush, of course, all shared the same political party, allowing September 11 to become a major rallying cry for the Republican party. See Richard L. Berke, *A Nation Challenged: Political Memo; Attacks Shift Spotlight on Public Figures*, N.Y. TIMES, Nov. 19, 2001, at A1 (discussing how September 11th popularized certain political figures).

without power.<sup>45</sup> The state feared more substantial blackouts could ensue, and when wholesale power prices (which federal regulators allowed to be set in the competitive market) skyrocketed, California utilities were placed in serious financial jeopardy because they were subject to a price cap on retail rates under the state deregulation plan.<sup>46</sup> California governor Gray Davis quickly declared a state of emergency and authorized the Department of Water Resources to buy power as part of a plan to stave off the Southern California Edison and Pacific Gas and Electric (PG&E) bankruptcies and, as a consequence, further blackouts.<sup>47</sup> He also requested that federal regulators intervene to help avert California's crisis.<sup>48</sup> However, the ultimate management of California's deregulation crisis resulted in finger-pointing between federal regulators, who did not want to impose price caps on the wholesale market, and state regulators, who had requested price controls.<sup>49</sup> This standoff reflected a deep ideological divide between California politicians, who favored the intervention of federal regulators, and the Federal Energy Regulatory Commission (FERC), which had embraced competitive wholesale markets and eschewed price controls.<sup>50</sup> California's governor, meanwhile, had limited options in two respects. First, federal law preempted many of the governor's actions, although ambiguities in federal law left other possible actions in a difficult gray area. For example, it has been noted that California's governor did not possess

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45. Terry Perry & Nancy Rivera Brooks, *California and the West; Lawmakers to Hold Hearing on Utility Bills; Energy: Reacting to Complaints About Soaring Costs in San Diego County, They Plan To Consider Amending, Delaying or Killing Deregulation Bill*, L.A. TIMES, July 21, 2000, at A3.

46. Chris Kraul, *U.S. To Decide Action on State Energy Crisis; Utilities: Regulators Today Will Release Plans for Tackling Electricity Costs. Potential Solutions Include Price Caps, Moves To Foster Competition*, L.A. TIMES, Nov. 1, 2000, at C1.

47. Jonathan Peterson, *The Recall Campaign; Energy Remains a Litmus Test on Davis as Manager*, L.A. TIMES, Oct. 5, 2003, at C1.

48. Governor Davis pursued a lawsuit designed to force federal regulators to impose limits on wholesale prices. Martha McNeil Hamilton & Greg Schneider, *Price Caps Have Questionable Record; Even if California Gets Controls on Electric Costs, They May Not Help*, WASH. POST, May 31, 2001, at E1. He also sent a letter to Congress which prompted Congress to urge federal regulators to act more aggressively. Richard Simon, *Senator Fires Warning Shot on Power Costs*, L.A. TIMES, June 7, 2001, at A1.

49. Miguel Bustillo & Nancy Vogel, *California and the West; The California Energy Crisis; Failure To Buy Entire Network May Doom Davis' Power Deal*, L.A. TIMES, Apr. 12, 2001, at A3.

50. Megan Garvey, *The Energy Crisis; FERC Issues Power Ruling*, L.A. TIMES, May 17, 2001, at A20.

authority to commandeer federally-owned electricity generators in the Naval Base in San Diego, no matter how necessary this may have been to the citizens of California.<sup>51</sup> In other respects, however, the scope of federal authority may have been more ambiguous, as federal regulators had not spoken clearly to any kind of prohibition of long-term contracts on the wholesale market. The state governor could have made a decision to exercise some authority over these contracts, but did not attempt to do so. Second, the market structure in California had been approved under state law, which limited the governor's range of options in response to the crisis.<sup>52</sup> For example, he did not use his emergency powers to suspend price controls under the state statute, nor did he order utilities to use more stable long-term contracts in lieu of the newly deregulated California spot market for electricity.<sup>53</sup> Eventually, federal regulators declared an emergency requiring natural gas and electric suppliers to provide power to the state's utilities,<sup>54</sup> two of which had filed for bankruptcy, but federal intervention was too late to make a substantial difference in the state. Governor Gray Davis continued to criticize federal regulators for their slow response to the crisis.<sup>55</sup> At the same time, many have also criticized Governor Davis for his inaction in responding to the crisis, other than the narrowest possible state regulatory responses that served to place any blame with federal regulators.<sup>56</sup> Ultimately, until federal regulators imposed restrictions on wholesale prices and California's legislature intervened to allow the state itself to buy power through long-term contracts, the situation was highly unstable.<sup>57</sup> Some have pointed out that there were party politics

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51. *Duke Energy Trading & Mktg. v. Davis*, 267 F.3d 1042, 1055 n.9 (9th Cir. 2001).

52. Peter Behr, *Calif.'s Davis Lacked Legal Ability to Solve Energy Crisis; Meltdown May Have Generated a Political Power Failure*, WASH. POST, Aug. 24, 2003, at A4; Miguel Bustillo & Nancy Vogel, *Special Legislative Session To Tackle Electricity Crisis; Energy: Democrats Favor Larger State Role, While GOP Backs Market-Based Answers. PUC Likely To OK Rate Hikes*, L.A. TIMES, Jan. 2, 2001, at A1.

53. Behr, *supra* note 52; Bustillo & Vogel, *supra* note 52.

54. Nancy Vogel, *California and the West; Ruling Shields Generators From Risk; Crisis: A Federal Agency Says Power Plan Operators Can't Be Forced To Supply Electricity Without a Guarantee of Payment. Regulators Are Accused of Abandoning Consumers*, L.A. TIMES, Feb. 15, 2001, at A3.

55. Mark Z. Barabak & Nancy Vogel, *The State; Riordan Attacks State Energy Role; Power: Candidate for Governor Urges Reduced Regulation and Criticizes Gov. Davis*, L.A. TIMES, Nov. 8, 2001, at B8.

56. Behr, *supra* note 52.

57. Richard A. Oppel Jr., *Enron's Many Strands: The Energy Market; Signs Enron Bet on Price Increase Before California Power Shortage*, N.Y. TIMES, Apr. 11, 2002, at C1.



lurking in the background, which might have encouraged inaction and finger-pointing by state and local officials.<sup>58</sup>

Government responses to the massive flood disaster following Hurricane Katrina revealed a similar dynamic, with much more drastic consequences for human life. Initially, when Hurricane Katrina led to severe flooding in New Orleans and elsewhere on the Gulf Coast, state and local officials declared an emergency<sup>59</sup> and quickly requested federal aid.<sup>60</sup> Louisiana's governor, for example, declared an emergency and established the Louisiana Recovery Authority, a special-purpose administrative agency with fairly broad powers.<sup>61</sup> Federal authorities, however, were extremely slow to react to the disaster in Louisiana and elsewhere.<sup>62</sup> As was the case in California, the pace of federal relief led state and local officials to place blame with federal regulators.<sup>63</sup> Meanwhile, federal regulators blamed state officials for failing to use their authority to force evacuations and for not communicating regularly with FEMA.<sup>64</sup> State

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58. The state of California and federal regulators faced off for months, "pointing fingers at each other." Behr, *supra* note 52. FERC embraced a regulatory approach, favoring no intervention in market-set prices. *Id.* California alleged energy suppliers were gouging prices. Dana Milbank, *Both Political Parties Say Enron Proves Their Point; Democrats Eye Calif.; GOP Points to Probe*, WASH. POST, May 8, 2002, at A5.

59. Wil Haygood & Ann Scott Tyson, *'It Was as if All of Us Were Already Pronounced Dead'; Convention Center Left a Five-Day Legacy of Chaos and Violence*, WASH. POST, Sept. 15, 2005, at A1.

60. Ken Silverstein & Josh Meyer, *Katrina's Aftermath; Louisiana Officials Indicted Before Katrina Hit*, L.A. TIMES, Sept. 17, 2005, at A17; Peter Applebome et al., *A Delicate Balance Is Undone in a Flash, and a Battered City Waits*, N.Y. TIMES, Sept. 4, 2005, at A17.

61. Reuters, *Katrina Recovery Panel Announced*, WASH. POST, Oct. 18, 2005, at A11.

62. Elizabeth Bumiller, *Democrats and Others Criticize White House's Response to Disaster*, N.Y. TIMES, Sept. 2, 2005, at A16; Josh White & Peter Whoriskey, *Planning, Response Are Faulted*, WASH. POST, Sept. 2, 2005, at A1.

63. Eric Lipton et al., *Breakdowns Marked Path From Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at 1.1. This failure to respond to a disaster that had been imminent for days was seen as poor reflection on the Department of Homeland Security's ability to react to any future disasters, especially terrorist attacks. Johanna Neuman & Nick Timiraos, *Chertoff Evokes 9/11 in His Katrina Defense*, L.A. TIMES, Feb. 16, 2006, at A12; *Katrina's Aftermath—The Response; Put to Katrina's Test; After 9/11, a Master Plan for Disasters Was Drawn. It Didn't Weather the Storm*, L.A. TIMES, Sept. 11, 2005, at A1.

64. Adam Nagourney & Anne D. Kornblut, *White House Enacts a Plan To Ease Political Damage*, N.Y. TIMES, Sept. 5, 2005, at A14; *see also* Susan B. Glassner & Josh White, *Storm Exposed Disarray at the Top*, WASH. POST, Sept. 4, 2005, at A1 ("Other federal and state officials pointed to Louisiana's failure to measure up to national disaster response standards, noting that the federal plan advises state and local emergency managers not to expect federal aid for 72 to 96 hours, and base their own preparedness efforts on the need to be self-sufficient for at least that period.").

officials in Louisiana, for example, had objected to the White House's requests to give the Pentagon control over the state's National Guard troops.<sup>65</sup> Given the different partisan affiliations of the state and federal officials involved, political rhetoric and blame led to inaction. Ambiguities regarding the scope of federal preemption and state separation of powers may have contributed to this inaction.<sup>66</sup>

Given the swiftness of executive action in reaction to such crises as the September 11 terrorist attacks, the California electricity crisis, and Hurricane Katrina, judicial intervention seems unlikely, if not futile. When asked to resolve conflicts regarding the exercise of emergency powers, courts simply cannot act quickly enough. Even if they could, their consideration of the assertion of emergency powers invites the judiciary into a thicket of highly volatile and frequently politicized issues. However, on occasion state courts have been asked to intervene in executive assertion of emergency powers, sometimes by a state legislature and sometimes by private stakeholders affected by emergency executive decisions. Judicial decisions often limit the scope of executive power. Judicial consideration of the executive powers exercised by state officials during emergencies consistently reinforces the understanding that there are no inherent executive powers under state constitutions, only delegated powers that must be managed by previously adopted statutes. This contributes to a limited understanding of executive power under state constitutions, which could encourage inaction by state officials in reaction to emergencies.

For example, following California's declaration of an emergency to address the state's electric power supply shortage, challengers filed a writ of mandamus asking the state to end its declaration of emergency. A state court of appeals determined that judicial consideration of the writ of mandamus was appropriate under the state emergency statute, given that the governor had issued his executive order under this statute rather than as an inherent constitutional power to declare an emergency.<sup>67</sup> The court reasoned

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65. Walters & Kettl, *supra* note 7, at 24.

66. One account emphasizes how state and federal officials had trouble defining the formal legal boundaries among federal, state, and local authorities. *See id.* at 20 ("What is more critical, and has significant implications for the future of emergency management in the United States, is the need to explicitly and thoroughly define governments' roles and responsibilities so that officials in other jurisdictions don't suffer the same sort of meltdown in the next natural or man-made disaster.").

67. Nat'l Tax-Limitation Comm. v. Schwarzenegger, 8 Cal. Rptr. 3d 4 (Cal. Ct. App. 2003) (depublished).

that this did not violate separation of powers,<sup>68</sup> although it did acknowledge that under California's emergency management statute, the effect of allowing a writ of mandamus to issue was the same as compelling the legislature to enact a joint resolution to end the emergency.<sup>69</sup> The court also rejected the argument that the governor's declaration of an emergency was a nonjusticiable political question,<sup>70</sup> notwithstanding that the California legislature had failed to pass a joint resolution or statute ending the emergency.<sup>71</sup>

Most judicial cases read the powers of governors during emergencies broadly,<sup>72</sup> but state courts do not generally classify these as inherent executive powers. For example, New Jersey has recognized that, although prison overcrowding had been a recognized issue for a number of years, New Jersey's governor had the authority to address the issue under his emergency powers without any type of serious new disruption.<sup>73</sup> His powers included the issuance of executive orders that contradicted statutory language.<sup>74</sup> The New Jersey Supreme Court, however, treated these powers as "delegated" emergency powers,<sup>75</sup> reasoning that they were not unconstitutionally

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68. *Id.* at 16.

69. *See id.* at 16–17 ("Contrary to the Governor's position, however, it does not follow that because a writ of mandate will not lie to compel the Legislature to terminate a state of emergency, it also will not lie to compel the Governor to do so.")

70. *Id.* at 21.

71. The court noted that the "judicially manageable and discoverable standards for resolving" an emergency dispute appear in the statute, *id.* at 18, and thus did not address whether a constitutionally-based declaration of an emergency is nonjusticiable.

72. *See, e.g.,* *Adkins v. State*, 59 Cal. Rptr. 2d 59, 64 (Cal. Ct. App. 1987) (observing that "the [Emergency Services Act] confers broad powers on the Governor to deal with emergencies," including with respect to Mediterranean fruitfly eradication) (quoting *Martin v. Municipal Court*, 196 Cal. Rptr. 218, 220 (Cal. Ct. App. 1983)), *abrogated in non-pertinent part by City of Moorpark v. Superior Court*, 77 Cal. Rptr. 2d 445 (Cal. 1998). California courts have also read the definition of "emergency" in various other statutes to encompass, for example, county property tax increases to meet budget requirements and electricity price manipulation. *See Malibu W. Swimming Club v. Flournoy*, 131 Cal. Rptr. 279, 282 (Cal. Ct. App. 1976) ("The evidence so summarized sufficiently supported the Controller's finding of a pressing necessity, that is, an emergency affecting the public health and safety."); *Hendricks v. Hanigan*, No. D037609, 2002 WL 397648, at \*9 (Cal. Ct. App. Mar. 14, 2002) ("[A] temporary, one-time infusion of money to combat an immediate and pressing emergency, the loss of power to residents of the state through blackouts. . . . meets the definition of an emergency under its commonly understood meaning.")

73. *Worthington v. Fauver*, 440 A.2d 1128, 1134–35 (N.J. 1982).

74. *Id.* at 1140.

75. *Id.*

broad<sup>76</sup> and finding that they were not exercised in an arbitrary and capricious manner.<sup>77</sup>

Although the broad reading of such powers seems harmless, the simple assertion of judicial authority to interpret emergency executive powers invites courts to second-guess executive determinations of emergencies. Indeed, some state courts have taken an excessively narrow reading of executive emergency powers. West Virginia's Supreme Court of Appeals, for instance, has interpreted the constitutional powers of the executive narrowly in the context of prison overcrowding.<sup>78</sup> Because West Virginia's statute defined an emergency, but did not include overcrowding in the definition,<sup>79</sup> the court held that the governor could not cite overcrowding as the reason for declaring a state of emergency.<sup>80</sup>

Although some state courts may interpret emergency powers too narrowly, judicial intervention also risks interpreting these powers too broadly, to the point where judges—rather than politically accountable officials—exercise emergency powers. As an illustration of the mischief that may result if courts are allowed to define the emergency powers of state officials, consider the disputes that followed the Missouri governor's decision to allow a state agency to deploy equipment to repair roads after massive flooding in that state. After the declaration of disaster, a judge in one of the counties issued a "preliminary order of Mandamus," ordering the state to release "three motor graders, three dump trucks, one front end loader and competent operators for the equipment" for use by the county.<sup>81</sup> County sheriffs arrived at storage sheds armed with the judicial order and attempted to seize the equipment.<sup>82</sup> In reviewing the legality of the county and the county judge's actions, a state appellate court determined that the state's management of the disaster took priority and deferred to the state agency, commenting that otherwise "we

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76. *Id.* at 1141.

77. *Id.* at 1139.

78. *See State ex rel. Dodrill v. Scott*, 352 S.E.2d 741 (W. Va. 1987).

79. At the time, the West Virginia Code defined an emergency as "a natural or manmade disaster of major proportions," and sets forth a policy of addressing "disasters of unprecedented size and destructiveness." *Id.* at 747 (quoting W. VA. CODE § 15-5-1 (1973)).

80. *Id.* at 747-48.

81. *State ex rel. Mo. Highway & Transp. Comm'n v. Pruneau*, 652 S.W.2d 281, 284 (Mo. Ct. App. 1983).

82. *Id.*

would have all chiefs and no Indians, and a Hydra without a head.”<sup>83</sup> Recognizing the floodgate that such claims invited for the judiciary, the court refused to intervene, noting that “[t]he ensuing brouhaha of claims of priority and superior need would be intolerable.”<sup>84</sup>

Another important issue is whether executive powers under state constitutions during a crisis include the authority to spend money that the legislature has not explicitly appropriated. In 2004, the Kentucky General Assembly adjourned without adopting an executive department budget for the 2004–2006 biennium.<sup>85</sup> Following the General Assembly’s continued failure to produce a budget, the governor unilaterally promulgated a “Public Services Continuation Plan.”<sup>86</sup> In reaction to continued legislative failure to adopt an executive department budget, the Kentucky governor adopted his own executive department budget and ordered the state treasurer to fund it.<sup>87</sup>

This fiscal crisis eventually reached the Kentucky Supreme Court, which refused to dismiss the issue as moot even though the Kentucky General Assembly later ratified the appropriations and expenditures under the governor’s Public Services Continuation Plan.<sup>88</sup> The state supreme court also refused to treat the budget standoff as a nonjusticiable political question.<sup>89</sup> Kentucky’s constitution does not expressly require the adoption of a budget, but does require Kentucky’s general assembly to raise sufficient revenues to cover the costs of government.<sup>90</sup> As the Kentucky Supreme Court noted, however, the state constitution’s separation of powers provision contains an “unusually forceful command,”<sup>91</sup> which “has no

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83. *Id.* at 289.

84. *Id.*

85. *Fletcher v. Commonwealth*, 163 S.W.3d 852, 856 (Ky. 2005).

86. *Id.* at 858. Unlike previous governors in the state who faced the failure of the legislature to enact a budget, Governor Fletcher did not declare an extraordinary session of the General Assembly. *Id.* at 857–58.

87. *Id.* at 858.

88. *Id.* at 859.

89. *Id.* at 860. As the court framed the case, “The issue . . . is not the efficacy or necessity of a particular appropriation, but whether the Governor has any constitutional authority to determine what are essential services or to unilaterally order *any* appropriations from the treasury.” *Id.*

90. The requirements appear in Sections 49, 50, and 171 of Kentucky’s constitution. *Id.* at 856.

91. *Id.* at 861 (quoting *Ex parte Auditor of Pub. Accountants*, 609 S.W.2d 682, 684 (Ky. 1980)).

counterpart in the United States Constitution.”<sup>92</sup> Specifically, the court observed, Section 28 of Kentucky’s constitution asserts: “No person or collection of persons, being of one of [the legislative, executive, or judicial] departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”<sup>93</sup> In the context of a strict construction of this provision, the court proceeded to address Section 230 of Kentucky’s constitution, which states “No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law . . . .”<sup>94</sup> After observing that this provision is “almost identical” to the Appropriations Clause of the U.S. Constitution,<sup>95</sup> the court stated that because the U.S. Supreme Court has consistently given this clause its “literal meaning” (restricting executive spending),<sup>96</sup> Kentucky should do the same.<sup>97</sup> The court did articulate several ways in which the legislature can appropriate funds on a continuing basis.<sup>98</sup> It also held that, to the extent the Supremacy Clause of the U.S. Constitution<sup>99</sup> requires compliance with a valid federal mandate, it can be funded by the Kentucky treasurer absent a specific appropriation by the state general assembly, but in other circumstances the executive’s assertion of spending power absent legislative appropriation is constitutionally suspect.<sup>100</sup>

The Kentucky Supreme Court’s assessment of the constitutional budget dispute rejected Governor Fletcher’s claim that the assertion of emergency powers changed anything regarding the balance of powers to spend unappropriated funds.<sup>101</sup> A long-recognized state case that had required the state treasurer to pay funds necessary to operate public facilities following the lifting of price controls after World War II was deemed by the court to be an “anomaly” to the

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92. *Id.*

93. KY. CONST. § 28.

94. *Id.* § 230.

95. U.S. CONST. art. I, § 9, cl. 7.

96. *Fletcher*, 163 S.W.3d at 864.

97. *See id.* at 864–65 (“Accordingly, we hold that . . . the unambiguous language of Section 230 prohibits the withdrawal of funds from the state treasury.”).

98. *Id.* at 865 (“Where the General Assembly has mandated that specific expenditures be made on a continuing basis, or has authorized a bonded indebtedness which must be paid, such is, in fact, an appropriation.”).

99. U.S. CONST. art. VI, cl. 2.

100. *Fletcher*, 163 S.W.3d at 868.

101. *Id.* at 871.

extent it was not overruled altogether.<sup>102</sup> As the Kentucky Supreme Court stated, “The Governor possesses no ‘emergency’ or ‘inherent’ powers to appropriate money from the state treasury that the General Assembly, for whatever reason, has not appropriated.”<sup>103</sup> Thus, outside of federal preemption that requires state action,<sup>104</sup> Kentucky’s governor possesses no spending power during a time of emergency absent legislatively approved appropriations.

## II. PRESUMPTIVE STATE LAWMAKING TO AVERT INTERSTATE CRISIS

Potential pragmatic and democratic problems can arise when state executives are asked to manage crises against the backdrop of two kinds of ambiguity: (1) ambiguity under state constitutional separation of powers principles, which may make it unclear whether state executives possess the power to act against stale statutes that purport to limit their authority; and (2) ambiguity under federal preemption doctrine, which leaves it unclear whether states have any jurisdiction to act at all or whether national authorities possess exclusive jurisdiction. Both kinds of ambiguity can allow state executives to evade responsibility for managing crisis, contributing to the blame game that plagues decisionmaking in many emergency management scenarios.<sup>105</sup> The blame game is endemic to the interjurisdictional gray area of shared authority in many regulatory contexts, which demand creative solutions.<sup>106</sup>

As a matter of state constitutional interpretation, a presumption of state executive lawmaking emergency authority can help to solve

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102. *Id.* at 869–70. In a bizarre passage, the court observed that *Miller v. Quartermouss*, 202 S.W.2d 389 (Ky. 1947), was justified partially by a budget surplus and by expediency, *Fletcher*, 163 S.W.3d at 870. Perhaps recognizing how unprincipled this interpretation is, the Kentucky Supreme Court concluded its rejection of Governor Fletcher’s emergency spending powers by stating “*Miller v. Quartermouss* is overruled to the extent it holds or can be interpreted otherwise.” *Id.* at 871.

103. *Fletcher*, 163 S.W.3d at 871.

104. Of course, the constitutional status of such federal mandates is doubtful. *See infra* note 138 and accompanying text.

105. The economic structure of this blame game is described in Ben Depoorter, *Horizontal Political Externalities: The Supply and Demand of Disaster Management*, 56 DUKE L.J. 101 (2006).

106. For one discussion of how shared authority within the federalist model is problematic, see Erin Ryan, *Federalism & The Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. (forthcoming 2007) (manuscript at 49–56, 89–92), available at <http://ssrn.com/abstract=930746>.

these kinds of ambiguity. Recognizing that state executives possess such authority would squarely authorize state officials to act to address crisis-related issues based on inherent executive power under state constitutions. State courts should recognize such a presumption in their decisions addressing emergency powers. State court recognition of the presumption is not sufficient to address the broader authority problems that arise during emergencies, as it is doubtful that state courts have the power to effectuate a major change in state executive authority through constitutional interpretation. However, by setting the stage for broader acknowledgement of the role of state executives in the political process, state constitutions can make a significant difference in how emergencies are addressed. State legislatures should take heed of such a presumption as they update and pass state emergency statutes. In addition, Congress also has the power, in considering national legislation, to adopt a presumption that would clarify the role of state and local governments in emergency planning, whether such legislation is general in nature, as the Stafford Act, or more specific, as in legislation addressing health emergencies or natural disasters. Adoption of such a presumption by Congress could serve to preempt ambiguous and contrary state separation of powers principles.

#### A. *Resolving the State Separation of Powers Problem*

To grasp the constitutional source of state executive assertions of emergency, it is important to evaluate the power of state executives to act against legislation that prohibits or limits their actions. Even when matters fall short of an emergency (or no official declaration of emergency is made), existing state legislation may fail to authorize state executives to respond to a national or regional crisis.<sup>107</sup> For example, agencies in many states lack delegated authority to approve the siting of new electricity transmission lines for purposes of enhancing national or regional (as opposed to *intrastate*) energy reliability. State legislatures have failed to update laws to authorize the regulation of certain pollutants under the Clean Water Act, limiting the ability of state environmental regulators to amend their

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107. Official declaration of an emergency should be a rare event under state constitutions, as it can suspend rights and have other consequences for democratic accountability. By presenting arguments for the expansion of executive lawmaking power during times of crisis that fall short of emergency, I suggest an interpretive principle that expands both liberty and accountability under state constitutions without requiring the executive to declare emergency.



rules to conform to federal law, and have also failed to authorize state executives to broker interstate compacts regarding water usage and other issues. Stale state legislation can also stand as a barrier to anti-terrorism and other law enforcement efforts.<sup>108</sup> Given that state legislatures are part time and meet infrequently,<sup>109</sup> stale laws present a very real barrier, even where there is widespread local consensus about the imminence or existence of a crisis or the implementation of national or regional goals.

Particularly during times of crisis, stale legislation may contribute to the perception that state executives have limited authority to act to address crises. Emergency provisions in state constitutions provide some relief during the most extreme situations, but are not sufficient constitutional mechanisms for interstate crisis management because they do not speak to the ability of the executive to make law (including agency rulemaking authority) and may not cover even the most urgent interstate crisis where an official “state of emergency” has not yet been declared. They also may require a state to cede authority to non-state entities. During times of crisis, state officials may perceive legislative restrictions on their power to act, limiting the flexibility and range of response options.

Executive power, however, can play a very positive role in crisis management. John Locke,<sup>110</sup> Alexander Hamilton,<sup>111</sup> and

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108. Several of these examples, including in the environmental and anti-terrorism arenas, are discussed in chapter 3 of JAMES GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005).

109. See *COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 126–29* (Keon S. Chi et al. eds., 2005) (detailing the meeting time and period for each of the state legislatures).

110. Locke stated:

Where the legislative and executive power are in distinct hands, as they are in all moderated monarchies and well-framed governments, there the good of society requires that several things should be left to the discretion of him that has the executive power. For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of Nature a right to make use of it for the good of the society, in many cases where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it; nay, many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require . . . .

JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* ¶ 159, at 89 (Prometheus Books 1986) (1690).

111. Alexander Hamilton, for instance, stated, “Energy in the executive is a leading character in the definition of good government.” *THE FEDERALIST NO. 70*, at 341 (Alexander Hamilton) (Terence Ball ed., 2003).

others<sup>112</sup> have argued for a strong executive lawmaker. More than 50 years ago, Justice Jackson also recognized the need for a flexible account of executive power, which adjusts to the circumstances or need for leadership:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.<sup>113</sup>

In cases where Congress has spoken to an issue, Justice Jackson characterized executive power as at its “lowest ebb.”<sup>114</sup> Here the executive is bound to follow legislative commands and is constrained by the ordinary constitutional lawmaking process.

Stale or obsolete legislation, however, poses a more intractable and less democratically resilient barrier at the state than at the national level. This is especially so where emergency events make legislation a barrier to problem solving or where there are interstate implications to state inaction. State executives are closer to the problems at hand than the federal executive. Moreover, state executives provide an opportunity for quick response, flexibility, and statewide electoral accountability for their decisions.

Where an emergency or interstate crisis makes law obsolete, the powers of the executive are perhaps more appropriately characterized as occupying what Justice Jackson deemed to be the “zone of twilight”—inherent to the executive but shared concurrently with the legislature.<sup>115</sup> The “imperatives of events” and “contemporary imponderables” that trigger the assertion of such powers will make an a priori definition difficult, but this does not diminish the necessity of such powers to executive governance.

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112. For a strong defense of deference to the modern executive under the U.S. Constitution, see Posner & Vermeule, *supra* note 3.

113. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

114. *Id.*

115. *Id.*

A principle of constitutional interpretation affording presumptive state executive lawmaking to anticipate or avert crisis could facilitate better crisis management at the state level. My proposal allows federal and state courts presumptively to authorize state or local executive lawmaking without giving the state or local executive agent absolute or permanent power. A decision based on such a presumption could be overridden by explicit state legislative action.<sup>116</sup> Upon declaring an emergency, a state executive would call the legislature into emergency session, allowing the legislature to exercise its own powers to override the executive, either by passing a contrary law that is not vetoed or through supermajority vote.<sup>117</sup>

It is not novel to suggest that executive power during times of crisis needs special constitutional attention, but under the U.S. Constitution commentators disagree on the extent to which and how the executive should be cabined. Professors Eric Posner and Adrian Vermeule suggest that strong deference to the executive under the U.S. Constitution may be appropriate during times of crisis.<sup>118</sup> Professor Bruce Ackerman argues for broader executive authority under the U.S. Constitution under what he calls the “Emergency Constitution,” which would be triggered by an attack on the United States and (pursuant to his proposed framework statute) would expire or be subject to supermajoritarian legislative override.<sup>119</sup>

Such proposals also have significance for the interpretation of state constitutions. The constitutional case for a presumption of executive authority is stronger at the state level than at the national level. At a minimum, such a presumption should encompass broader lawmaking powers (including agency rulemaking), and generally should be sufficiently triggered by all interstate crises, not just attacks.

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116. Elsewhere, in Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999), the author creatively argues for dissecting state legislative and executive actors to implement federal law. While my prescription is not inconsistent with Professor Hills' proposal, my analysis is focused on special rules of state constitutional interpretation that would apply in states, or national legislation that would preempt states, during times of interstate crisis.

117. Of course, if a state does not have a legislative veto, simple majority vote of both chambers of the legislature would suffice to override the executive.

118. Posner & Vermeule, *supra* note 3, at 606–07.

119. Ackerman, *supra* note 3, at 1059–60. For criticism of Professor Ackerman's proposal, see David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004); and Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004). *But see* Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004) (responding to critics).

Such executive authority would include not only general authority to issue executive orders but also broad rulemaking authority (subject to a state's administrative process) that exceeds extant legislative delegations to the executive. This presumption would both stand to enhance political legitimacy during times of crisis and have a strong legal basis in state constitutions.

First, at the level of political legitimacy—i.e., in terms of promoting good government—this approach stands to enhance the political legitimacy of state lawmaking within a federal system. Stale legislation reflects implicit (not explicit) political judgments, so a presumption of executive lawmaking authority to implement national or regional goals makes political decisions more transparent. A presumptive executive lawmaking approach forces either a state regulator or a state legislature to be explicit if it refuses to update regulatory laws to avert crisis. This would improve local political accountability by enhancing the majoritarian legitimacy of a state's decision to hold to the status quo, should the state choose that course. Put simply, with such a presumption state executives will be able to act more rapidly in response to crisis and state laws will be in better shape to avert crisis in the first place.

Second, this approach also has a sound basis in state constitutional law. Presumptive state executive lawmaking to avert crisis is the best interpretation of separation of powers under state constitutions. The positive legal rules of separation of powers vary from state to state.<sup>120</sup> Regardless of positive law, however, exclusive vesting of lawmaking power in an exclusively legislative body through separation of powers is only desirable insofar as it improves the lawmaking process, including the primary purpose of minimizing factionalism in lawmaking. Due to the economics of interest-group decisionmaking, state and local lawmaking may be more vulnerable to faction and the domination of extreme interest groups than national politics, where the political power of extreme groups is more likely to be dispersed.<sup>121</sup>

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120. See Rossi, *supra* note 14, at 1190–91 (discussing differences between strict, general, and non-explicit separation of powers clauses within state constitutions).

121. I make this argument to support executive authority to implement cooperative federalism programs in Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343 (2005).

For example, in the case of an interstate health crisis, a state executive might be asked to suspend rules prohibiting the unauthorized practice of medicine by out-of-state physicians.<sup>122</sup> Such rules serve some consumer protection function but also work to impede new entrants into the medical profession. Thus, any relaxing of the separation of powers barrier (allowing such rules to be suspended) would work to impede, rather than enhance, factionalism in state lawmaking. In this sense, as a matter of state constitutional law, internal (state or local) structural requirements should pose a minimal barrier to executive action that averts interstate crisis, furthering national or regional goals.

The case for a presumption of executive authority is particularly strong in the context of lawmaking—such as the suspension of statutes and regulations, or the adoption of regulations—but there is also a solid constitutional basis for extending some emergency budgetary authority to executives. In contrast to the powers of the president, which have been examined in some detail,<sup>123</sup> the general principles of state executive budgetary authority during a crisis are relatively unexamined constitutional ground. According to Professor Greg Sidak, the legislative supremacy view of the Appropriations Clause of the U.S. Constitution is flawed:

The Framers would not have assigned to the President such responsibilities as the making of treaties, the commanding of the armed forces, and the faithful execution of laws if they expected that Congress could selectively veto the execution of these functions by defunding them. There must exist an implied power for the President to obligate the Treasury, at least for the minimum amount necessary for him to perform the duties and exercise the prerogatives that article II imposes on his office. To conclude otherwise would require embracing the unlikely proposition that thrift was an object more precious to the Framers than was the

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122. The draft Uniform Interstate Emergency Healthcare Services Act, a current project of the National Conference of Commissioners on Uniform State Laws, is designed to suspend state criminal and civil penalties on out-of-state physicians during times of crisis. Uniform Interstate Emergency Healthcare Services Act, <http://www.law.upenn.edu/bll/ulc/uehsa/apr2006draft.htm> (last visited Sept. 21, 2006). This uniform act would allow state governments to grant emergency licensing reciprocity on an interstate basis and to provide disaster health care workers with protection from civil liability. *Id.* §§ 5–6.

123. For a discussion of the history and meaning of the Appropriations Clause of the U.S. Constitution, see generally J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162; and Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

perfection of a Constitution that “diffuses power the better to secure liberty.”<sup>124</sup>

On Sidak’s view, the Appropriations Clause is intended to ensure fiscal responsibility and accountability, not legislative supremacy.

Although the Kentucky Supreme Court spoke with confidence that the legislative supremacy view of fiscal appropriations has unambiguous constitutional support,<sup>125</sup> it would seem that some of the same general principles that recognize some executive power of the purse at the federal level would also be applicable under state constitutions and especially during a crisis.<sup>126</sup> As the dissent in the case addressing the emergency spending powers of Kentucky’s governor suggested, the state’s constitution is not a “suicide pact,”<sup>127</sup> and the logical extension of severe separation of power limitations to state executives during a time of crisis could lead to the “destruction of government.”<sup>128</sup> Understanding a presumption of state lawmaking authority to include some spending or appropriation power is not the last word, but would challenge the legislative supremacy understanding of appropriation powers under state constitutions, particularly during times of crisis.

Of course, I am not claiming that state constitutions are incorrect to restrict executive spending of unappropriated funds in situations that fall short of an officially-declared emergency. Outside of an officially-declared emergency, the executive branch generally does not have the constitutional authority to appropriate funds. Some state constitutions provide for emergency appropriations by the executive when a state legislature cannot meet. Where, however, a state legislature purports to limit by statute what an executive can spend during a crisis, or a state constitution is silent about emergency appropriations, a presumption of state executive lawmaking recognizes that spending decisions during a crisis may be made by the executive, subject to legislative ratification or override.

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124. Sidak, *supra* note 123, at 1253 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

125. See *supra* notes 88–104 and accompanying text.

126. Even the legislative control interpretation of the Appropriations Clause endorsed by Professor Kate Stith envisions some residual executive power to spend during times of necessity, which would include emergencies. Stith, *supra* note 123, at 1351–52.

127. *Fletcher v. Commonwealth*, 163 S.W.3d 852, 877 (Ky. 2005) (Lambert, C.J., concurring in part and dissenting in part) (citing *Terminiello v. Chicago*, 337 U.S. 1, 37 (1959) (Vinson, C.J., dissenting)).

128. *Id.*

*B. Preemption and Judicial Deference to State Executives Interpreting Ambiguous Federal Law During Times of Interstate Crisis*

Resolving state separation of powers barriers is necessary but not sufficient to establish effective state executive authority to address crises. State executives may also be led to inaction by ambiguities regarding the scope of federal preemption. To the extent that state executives perceive that federal law limits their authority to act, this may lead them to expect federal solutions to emergency problems. For example, in the California electricity crisis, Governor Davis expected federal authorities to address the issue and perceived many options to be preempted by federal law.<sup>129</sup> In the wake of Hurricane Katrina, state officials may also have deferred to federal emergency officials, expecting them to take more aggressive actions that would preempt any state responsibility for the issue.<sup>130</sup> In both contexts, however, it seems that there was uncertainty regarding the extent to which federal statutes or regulations, or discretionary actions of federal officials, may have preempted state officials. Uncertainty, and an expectation of federal intervention, contributes to state inaction and to the evasion of state responsibility for solving problems.

A common reaction to this problem of shared authority is to propose a presumption against preemption, which makes it clear that the primary responsibility to act lies with the state, not with the national government.<sup>131</sup> The presumption against preemption may be a necessary starting point, but it is not sufficient to address the shared authority problem, as shared authority can also obfuscate whom, within a state, has the authority to act. In this sense, the horizontal ambiguities under state law regarding who has authority to act may ironically serve as a barrier to any resolution of vertical ambiguities. A presumption against preemption may make it clear that a state has the authority to act, but this will not necessarily make it more likely the state will act, particularly if there is uncertainty regarding

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129. See *supra* notes 51–58 and accompanying text.

130. See *supra* notes 59–66 and accompanying text.

131. For a defense of the presumption against preemption as a resistance norm in federal constitutional law, see Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1385–86 (2001); and Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process* 16 (Pub. Law & Legal Theory Res., Paper No. 27), available at <http://papers.ssrn.com/abstract=412000> (highlighting how preemption doctrine can create poor political decisions and how a presumption against preemption better aligns incentives for democratic accountability).

authority within the state. Furthermore, the presumption against preemption may undermine the value of having any national coordination of problems at all, posing a particularly weak starting place for emergency or crisis management schemes.

By contrast, a presumption of state executive lawmaking provides a middle ground that recognizes the value of state authority, resolves intrastate ambiguity, and retains national coordination authority. To the extent that a presumption of executive lawmaking attaches to state executives during times of interstate crisis, this would clearly authorize a state's officials to act to fill in gaps against any ambiguity created under federal law. In other words, the inherent executive authority to manage crisis includes a state executive taking a position where federal law leaves room for state or local solutions. To the extent that a state position is not consistent with federal objectives, Congress or federal regulators would retain the authority to expressly preempt the state by taking a clearer stance—either by the adoption of a statute or regulation or by the exercise of discretionary authority. However, where federal law is ambiguous, federal courts would defer to state executive actors during times of crisis.<sup>132</sup>

As a matter of federal constitutional law, vesting presumptive state or local authority to avert crisis with a state executive branch agent is a legitimate extension of federal preemption jurisprudence. The predominant judicial approach to implied preemption allows federal law to preempt substantive state and local legislation, but disfavors preemption of state constitutions.<sup>133</sup> Presumptively authorizing a state or local executive to act to avert crisis adds a new twist to federal preemption jurisprudence: it would invite federal courts to preempt state and local constitutions for crisis purposes while leaving specific legislative judgments to state decisionmakers

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132. Similarly, Professor Phil Weiser has argued for *Chevron* deference to state officials under cooperative federalism programs, such as those in the context of telecommunications deregulation. Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1 (1999) (arguing that federal statutes that call for state executive agencies to interpret federal law, subject only to federal review, should afford a high level of deference to state executive decisions).

133. As an illustration, in a concurrence to the opinion finding Governor Fletcher's unilateral adoption of a Public Services Continuation Plan unconstitutional, Justice Keller maintained that Congress could not preempt Kentucky's separation of powers provisions after *Printz v. United States*, 521 U.S. 898 (1997). *Fletcher v. Commonwealth*, 163 S.W.3d 852, 881 (Ky. 2005) (Keller, J., concurring in part and dissenting in part).



(whether executive or legislative). According to Justice Keller's concurrence to the state supreme court opinion rejecting the unilateral adoption of a budget by Kentucky's governor, "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."<sup>134</sup> However, the presumption of state lawmaking leaves the fundamental value choice entirely to state officials and legislators. In no way does it trump the will of the electorate with respect to any substantive value regarding a governmental decision. Thus, in pursuing crisis-related goals, it is less intrusive both as a matter of law and political process for federal courts to preempt the state decision making process—i.e., to preempt structural limits in state constitutions—than it is for federal courts to impliedly preempt substantive legislative judgments by state or local lawmakers.

There are obvious limits to this approach insofar as federally-protected constitutional rights are invoked.<sup>135</sup> However, there is no Tenth Amendment barrier, given that no state or local regulatory action is compelled and that it promotes democracy at the state and local level. *Printz v. United States*<sup>136</sup> establishes clearly that Congress or federal regulators cannot "commandeer" state officials by requiring them to act.<sup>137</sup> Although the Court in *Printz* spoke to the issue of federal mandates, it did not speak to many other questions, including "purely ministerial reporting requirements" imposed by Congress on states.<sup>138</sup> The scope of *Printz* remains a matter of considerable uncertainty.<sup>139</sup> On one reading, this case might be

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134. *Id.* (citing *New York v. United States*, 505 U.S. 144, 168 (1992)).

135. A state cannot, for instance, ignore Fifth Amendment rights in seizing private property during a crisis.

136. *Printz*, 521 U.S. 898 (1997).

137. *Id.* at 935.

138. *Id.* at 936 (O'Connor, J., concurring) ("[T]he Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.").

139. See, e.g., Hills, *supra* note 116, at 1231 ("In short, precedent and policy do not provide certain guidance about the proper role of the state and federal governments."); Vicki C. Jackson, *Federalism and the Use and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2205 (1998) ("The breadth of *Printz's* effect on other federal statutes is unclear, although a small number of statutes are clearly invalid under *Printz*."); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 257 (2005) ("The Court's focus on dividing federal and state authority provides little assistance in addressing areas in which federal and state powers overlap, and the areas of concurrent authority vastly outnumber any possible realms of exclusive power.").

understood as a meta-rule of recognition that precludes federal law from interfering with state constitutional commands, such as state separation of powers. By authorizing a state official to act, Congress and the federal courts through implied preemption, are, in a sense, commandeering a state legislature to explicitly take action if it disagrees with the decisions of a state executive. In contrast, on its own terms, the state constitution would not require any such action by the state legislature.

As Professor Robert Schapiro has recognized, however, “[a]lthough the state political process enjoys constitutional protection, the particular outputs of that process do not.”<sup>140</sup> Merely *authorizing* state officials to act, differs from *requiring* them to act to achieve a specific outcome. The presumption of executive lawmaking authority would leave the choice of acting or not acting with state officials, but clarifies who, between the state and federal system and within state government, has the authority to act. No specific action or outcome is compelled, although it is clarified that state authorities would have power should they choose to use it. The judgment of whether or not action is appropriate, for any given state, is left entirely to the voters of that state. In this sense, the presumption of state executive lawmaking would still allow the state political process to operate independent of the specific preferences of Congress in response to any given disaster.

### C. *Keeping State Courts at Bay*

The scope of judicial exclusivity in interpreting state constitutions is under-explored.<sup>141</sup> To the extent any presumption of state lawmaking authority is an inherent executive power, it cannot be limited by either state legislatures or by state courts. Although courts typically play an active role in interpreting state constitutions, their general role in reviewing a state executive’s emergency powers under separation of powers principles should be very limited.

The leading account of state constitutions advanced by Professor James Gardner envisions courts as presumptively exercising the authority to interpret state constitutions where there are potential

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140. Schapiro, *supra* note 139, at 286.

141. For an excellent analysis of exclusivity under the U.S. Constitution, see Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998).

conflicts between state and national power.<sup>142</sup> Gardner's account of state constitutional interpretation recognizes that state courts do not interpret their constitutions in isolation when dealing with issues of federal-state coordination.<sup>143</sup> State courts serve an important function in interpreting state constitutions to the extent that they provide a resistance against the exercise of federal power, particularly in ways that reduce liberty.<sup>144</sup>

The state judicial branch, however, should not have any special monopoly on interpreting state constitutions—and especially with respect to checking federal power. For example, local officials in San Francisco, California, and Multnomah County, Oregon, attracted nationwide attention when they drew on their own interpretation of state constitutional guaranties of equality to issue marriage licenses to same-sex couples, even over the objections of governors and other state officials. Drawing from these disputes, Professor Norman Williams has argued that state executive branches and state legislatures have independent abilities to determine the constitutionality of their actions in enforcing and enacting statutes.<sup>145</sup> Other branches of state government can and will play as important a role as courts in interpreting state constitutions, but their interpretive task—just as much as the courts'—may depend on recognizing a presumption of constitutional interpretive power.

“Extra-judicial” interpretation of state constitutions can play many roles, including enhancing competition among different visions of constitutional text and furthering political accountability for constitutional interpretations. It thus seems important that a theory of state constitutional interpretation focus not only on the presumptive power of courts, but also on the powers of the legislative and executive branches. Professor Walter Dodd, for example, viewed the function of state constitutions as limiting legislative power, and the

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142. GARDNER, *supra* note 108, at 228.

143. *Id.* at 87–94. *See, e.g.*, Dep't of Legal Affairs v. Rogers, 329 So. 2d 257, 261–67 (Fla. 1976) (reviewing several cases and state statutes throughout the court's analysis); McFaddin v. Jackson, 738 S.W.2d 176, 181–82 (Tenn. 1987) (reviewing tax delegation decisions of several state supreme courts); *Ex parte Elliott*, 973 S.W.2d 737, 740 (Tex. App. 1998) (reviewing Texas case law regarding delegation). Elsewhere, I argue that implicit authorization for state executive and local agencies to act on behalf of federal goals is the best interpretation of state separation of powers, which is a matter of state constitutional law that courts should acknowledge. Rossi, *supra* note 121, at 1347–48.

144. GARDNER, *supra* note 108, at 196–97.

145. Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 614 (2006).

main presumption for him would have been to authorize the legislature to act absent limiting evidence to the contrary.<sup>146</sup> In the context of emergencies, state constitutions are best interpreted by the executive and legislative branches, not by courts.<sup>147</sup>

Cases suggesting that executive powers during times of interstate crisis are delegated, or must conform to statute,<sup>148</sup> thus fail to recognize the importance of inherent executive power at the state level and must be reassessed in terms of their generality for state constitutionalism. In this sense, the assertion of state executive power to declare law during a time of emergency should be nonreviewable in state courts, and is better understood as representing a political position to be evaluated by the state legislature.<sup>149</sup> For example, when Democratic members in the Texas legislature realized that the passage of redistricting legislation that would favor the Republicans in future elections was imminent, many of these members fled the state to avoid a quorum. Texas' Republican governor used his emergency powers to declare an "emergency special session," calling the state legislature into session for purposes of addressing the redistricting legislation, which the legislature proceeded to pass. Courts were asked to untangle this dispute,<sup>150</sup> but to the extent that

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146. Walter F. Dodd, *The Function of a State Constitution*, 2 POL. SCI. Q. 201, 215 (1915).

147. The argument for extra-judicial interpretation of constitutions seems stronger at the state level than at the federal level, to the extent that state constitutions are more readily and frequently amended through referenda or by scheduled constitutional conventions. One rationale for regular amendment of state constitutions is to create a sort of jurisdictional competition with the state legislature. For instance, if the legislature fails to recognize the importance of a topic, such as the protection of the environment, referenda allow law reformers to go directly to the people with their concerns. See ELISABETH R. GERBER ET AL., *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY 2* (2001) ("Two factors support the notion that winning initiatives influence policy directly and substantially: the large number of initiatives and the style of modern initiative campaigns."); Elisabeth Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99, 101 (1996) ("Legislators know that policy advocates (typically established interest groups) may propose initiatives in response to the legislation they pass or may pursue their own policy agenda via initiatives in response to legislative inaction."). To the extent state constitutions are loaded with law reforms adopted for this reason, it would be odd to afford these law reforms the same constitutional status as the Bill of Rights under the federal constitution.

148. See *supra* notes 72–80 and accompanying text.

149. For a similar argument at the national level, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) ("The President's power to interpret the law is, within the sphere of his powers, precisely coordinate and coequal in authority to the Supreme Court's.").

150. Kris Axtman, *Texas Duel Highlights Separation of Powers*, CHRISTIAN SCI. MONITOR, Aug. 13, 2003, at 2.

the emergency powers of the executive are inherent constitutional powers, courts have little to add to such constitutional standoffs. To be sure, there may be a limit on the executive's ability to declare an emergency over something like a redistricting vote—otherwise there is a strong incentive for the executive to overstate danger for the strategic political advantage of sustaining its own power. For this reason many states provide by statute for very orderly postponement of elections in the event of emergency.<sup>151</sup> Such provisions were invoked without incident following September 11, when New York officials were forced to postpone the city's mayoral elections.<sup>152</sup> In the aftermath of Hurricane Katrina, the Louisiana governor's declaration of emergency led New Orleans officials to postpone elections as well.<sup>153</sup> Opportunities for political manipulation are certainly present, but outside of elections, as long as other constitutional provisions are adhered to and the legislature retains the ability to override the decision of state executives, little can be gained through judicial oversight of emergencies at the state level. In any event, given that these kinds of crises are not interstate crises, the constitutional powers of state executives are more limited than in the context of other emergencies.<sup>154</sup>

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151. See L. PAIGE WHITAKER, CONG. RESEARCH SERV., STATE ELECTION LAWS: OVERVIEW OF STATUTES REGARDING EMERGENCY ELECTION POSTPONEMENT WITHIN THE STATE 2 (2004) (“[S]ome states have enacted statutes providing for the temporary postponement of certain elections in their respective states, precincts, districts, or counties.”).

152. In 2001, New York Mayor Rudy Giuliani faced term limits. The primary, originally scheduled for September 11 but cancelled due to the terrorist attack on the World Trade Center, was postponed. Mayor Giuliani's plan to stay in office for three months beyond the expiration of his term was rejected by state lawmakers. See Richard Perez-Pena, *Giuliani's Quest for a Term Extension Hits a Wall in Albany*, N.Y. TIMES, Oct. 2, 2001, at D1 (“State lawmakers declared the idea of extending [Giuliani's] term by 90 days all but dead . . .”).

153. See John Hill, *New Orleans Elections May Be Held in April*, THE TIMES (Shreveport, La.), Dec. 18, 2005, at 1A, available at <http://www.shreveporttimes.com/apps/pbcs.dll/article?AID=/20051218/NEWS01/512180322/1002/NEWS> (“During its special session last month, the Louisiana Legislature added to election law a procedure that gives the secretary of state's office the power to declare an emergency and set up a plan for another election, requiring the approval of two legislative committees, the state attorney general, the governor and the Legislature.”). Displaced Louisiana voters challenged the date of the election, but a U.S. District Court judge would not allow the election to be suspended beyond May, the date specified in the New Orleans charter. See Sam Quinones, *Judge Rejects Suit to Open New Orleans Poll Stations Around U.S.*, L.A. TIMES, Feb. 25, 2006, at A9.

154. A state emergency that affects national elections, for example, would give rise to a stronger argument for inherent executive power to suspend or postpone elections. Given that a delayed national election would likely interest Congress as much as state governors, federal preemption of a state's idiosyncratic election postponement decisions would seem likely.

Certainly, any presumption of executive lawmaking authority during times of crisis is not without controversy. The case for a strong executive at the federal level has generated much criticism,<sup>155</sup> and it could be expected that a strong state executive would do the same. However, the arguments for a strong executive at the state level are stronger than at the national level. The two strongest objections to the presumption of lawmaking authority during a crisis are that it could result in an ongoing assertion of “emergency” or “crisis” powers, and that it could be abused by state executives in ways that undermine civil rights. Neither objection withstands scrutiny.

In his concurrence to *Youngstown Sheet & Tube Co.*,<sup>156</sup> which held that President Truman lacked the inherent executive power to seize steel mills during a wartime labor dispute, Justice Jackson raised the concern that “emergency powers would tend to kindle emergencies.”<sup>157</sup> Executives could claim emergencies for no good reason, and emergencies would have no end—once declared, an emergency might generate its own special justification for the exercise of power with no opportunity or incentive to limit it.<sup>158</sup> These are legitimate concerns, especially when applied to the office of the president, but there are additional checks and balances at the state level to avoid strategic declaration of emergencies. Of course, as with the federal executive, one check built into the strong state presumption of executive lawmaking authority is the state legislature,

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155. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551–52 (2004) (countering the claim that the Vesting Clause, U.S. CONST. art. II, § 1, cl. 1, grants the president broad residual powers not specified in Article II); Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 887–95 (1983) (arguing that courts should evaluate challenges to presidential acts that lack express statutory or constitutional authorization by determining whether they infringe on legislative or judicial powers); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993) (concluding that the president has lawmaking power only over protection of “personnel, property, and instrumentalities of the United States”); Paulson, *supra* note 149, at 221–22 (arguing that the president has powers co-equal to other branches in interpreting his own powers); H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 529, 545–49, 554–76 (1999) (defending the president’s primary constitutional authority over foreign affairs). See generally Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005) (surveying the history of the unitary executive).

156. 343 U.S. 579 (1952).

157. *Id.* at 650 (Jackson, J., concurring).

158. See *id.* (“[The framers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation.”).

which has the power to override the executive. However, another layer of checks is the federal government, which has the power to adopt a law or regulation that preempts a state emergency. Given that the presumption of state executive lawmaking is at its strongest where states are addressing interstate emergencies, the risk of strategic use of the presumption for purposes of political advancement by state executives is limited. Moreover, once state courts have the opportunity to define the crisis threshold, abuses of emergency powers by state executives can be cabined. Not every important policy problem will qualify as a crisis, which is a unique lawmaking event in that it is unexpected, requires immediate action, and has unambiguously negative consequences if left unaddressed.<sup>159</sup> A presumption of state executive lawmaking would encourage state courts to contribute to the dialogue of classifying the kinds of events (such as natural disasters, terrorist attacks and interstate crises) that are in fact crises and those events (such as poor policy or bad political choices) that are not.

Arguments for a strong executive during times of crisis at the federal level have generated much controversy, largely centered around the implications of unbridled executive power for civil rights,<sup>160</sup> but any concern that strong state executive authority at the state level will undermine civil rights, or lead to massive civil rights abuses, is unfounded. If, during a time of state-declared emergency, a state executive were to encroach on a constitutionally protected right, the person whose right was violated would not be without legal recourse. Adjudication of civil rights or constitutional violations in federal court would still be available, because the Bill of Rights is incorporated to the states and would trump contrary state law concerns.<sup>161</sup> In this sense, the case for a strong executive at the state

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159. See *supra* note 4 and accompanying text.

160. See Cole, *supra* note 119, at 1768 (“In fact, emergency powers take almost as many forms as emergencies do, and raise a host of difficult and distinct civil liberties questions . . .”); see also David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2594 (2003) (arguing that, through stare decisis, courts can develop principles for managing constitutional emergencies). Cole seems overconfident about the federal judiciary’s ability to develop principled and useful precedents for managing crisis. Even, if his arguments make a compelling argument for judicial review at the federal level, it is my claim that they are substantially weaker when applied to constitutional emergencies at the state level.

161. Should the U.S. Constitution suspend the same protections during time of emergency, a state constitution would provide no less civil rights protections during time of emergency—but also no more.

level is stronger than the case for a strong national executive, as civil rights or constitutional remedies are more likely to present a direct conflict with the assertion of national executive power.<sup>162</sup>

Ultimately, how executive power is conceived under state constitutions should have implications for the state emergency framework statutes that are passed by legislatures to manage executive decisionmaking during interstate crisis. To the extent that state executive power to declare and manage interstate crisis is an inherent constitutional power, state framework statutes cannot limit the situations in which an executive can declare a crisis. Such statutes also cannot limit the procedures under which state executives manage interstate crisis. Such statutes can, however, delimit legislative processes for overriding the executive during times of crisis and are best limited to this topic. They also can clarify the issue of interstate reciprocity,<sup>163</sup> which may be fundamental to successful state-led management of crisis, although the analysis of this Article would suggest that reciprocal concessions are an inherent state executive power. State legislatures addressing emergency management statutes should recognize that many provisions in these statutes, such as limits on the emergency powers of an executive or limits on the definition of an emergency, are constitutionally questionable and create ambiguity regarding the power of state executives to act during a crisis. A more constructive legislative approach would be focused on framework processes for legislative checks on state executive lawmaking authority during emergencies, including legislative processes for overriding legal and budgetary decisions of the executive, rather than on micromanaging emergency powers.

The constitutional presumption of state executive lawmaking also has implications for Congress, as it reconsiders statutes dealing with general emergency management, as well as more specific statutes. As the analysis above suggests, Congress has the power to

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162. I am not, for example, suggesting that “departmentalism”—the view that an entity has the authority to interpret the constitutional provisions applied against it where there is not a specific constitutional interpretation to the contrary—extends to states as well as to national branches of the government. See Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 *LAW & CONTEMP. PROBS.* 105, 117 (Summer 2004) (“Emphasis on the independent status of the branches, and the perceived need to maintain rigid lines and rules, leads many self-described departmentalists to positions of absolute or near-absolute interpretive autonomy for each branch in the exercise of its responsibilities.”).

163. See *supra* note 122 and accompanying text.



adopt a statute that preempts any ambiguity regarding state executive emergency powers under state constitutions. For example, in the context of a statute such as the Stafford Act,<sup>164</sup> Congress could authorize state executives to adopt regulations and expend state funds during a crisis, even when a state legislature has not delegated such authority to a state executive *ex ante*. As long as Congress leaves the specific political decision to adopt a regulation or expend funds to a politically accountable state actor, such as a state governor, there is no constitutional barrier to Congress adopting an across-the-board recognition of the presumption of state executive lawmaking during times of crisis.

Moreover, in the context of subject-specific legislation, Congress could recognize the presumption of state executive lawmaking as a way to facilitate better federal-state coordination in the resolution of important problems. For example, in emergency health legislation, Congress could authorize state executives to take action even absent delegated authority from a state legislature. In areas such as electric power regulation, where Congress has addressed federal management of electric transmission reliability,<sup>165</sup> Congress could authorize a state Governor, or a specific state agency official, to take action regarding the siting of transmission lines or power plants even absent delegated legislative authority. Such subject-specific adoption of a presumption of state executive lawmaking may allow Congress to assist states in clarifying the authority of state executives to act to solve problems during a crisis.

### CONCLUSION

It is beyond controversy that state government responses to recent crises, such as the California electric power crisis and Hurricane Katrina, could have been quicker and more aggressive. Perhaps the deficiency in response to these crises was just politics. Leadership failures at the state and local level might explain a lag in

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164. See *supra* notes 8–11 and accompanying text (discussing federal-state coordination in the Stafford Act framework).

165. For instance, in the Energy Policy Act of 2005, Congress extended to federal regulators authority over backstop transmission siting, as well as the ability to set federal reliability standards for electric transmission. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221, 119 Stat. 594, 946–52. Neither of these provisions, however, addresses the state regulatory process involving siting.

response. On this view, the problem could be solved in the next round of elections by voting for better leaders.

However, because political leadership does not operate independent of constitutional and legal frameworks, crisis management problems will likely surface again. It is well recognized that blurred jurisdictional lines between federal and state officials may have contributed to the problem with recent crisis response.<sup>166</sup> Although it is tempting to respond to this problem with an across-the-board expansion of federal authority, I have argued in this Article that a lack of clarity regarding the scope of executive power within a state can also pose a barrier to effective crisis management at the state and local level. This is unfortunate, as state and local executive officials are closest to the problems at hand and, as between different institutional actors, frequently possess the most flexibility in approach and political accountability to address them.

Presumptive executive power to respond to interstate crisis—and to act proactively to avert it—stands to empower state executives to take a more central role in the political process while also helping to improve the quality of state lawmaking. Such a presumption would recognize that state executive emergency powers are inherent to the executive but also are shared with a state legislature and, potentially, with Congress. This proposed presumption has practical implications not only for state courts in addressing separation of powers disputes but also for state legislatures, as they adopt emergency framework statutes, and Congress, as it considers various reforms designed to address emergencies. Ultimately, the presumption might best be utilized as a drafting canon by Congress in federal statutes and regulatory programs, as a way to preempt potential state constitutional barriers to crisis management that can stand in the way of well-intentioned federal programs.

The benefits to presumptive executive lawmaking at the state and local level are many and its constitutional barriers are minimal. It would be unwise to think that attention to state and local executive authority is going to eliminate disasters or tragedies. But there is ample evidence of a need to clarify the authority of state and local actors to respond to a crisis. The proposed presumption of state executive lawmaking would fill this need. More important, it would

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166. See Walters & Kettl, *supra* note 7, at 20 (“What is more critical . . . is the need to explicitly and thoroughly define governments’ roles and responsibilities so that officials in other jurisdictions don’t suffer the same sort of meltdown in the next natural or man-made disaster.”).

give state executives a more proactive role in crisis aversion, making it less likely that the state executive will be able to escape responsibility for crisis planning and management.

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